IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :20.11.2007

CORAM

THE HON'BLE Mr. JUSTICE K.VENKATARAMAN

Second Appeal No.1383 of 1995 and

C.M.P.No.6810 of 1999

1.Gopal
2.Minor Ramachandran
3.Minor Ramesh ... Appellants/Plaintiffs

(Appellants 2 and 3 being minors
are duly represented by their
mother and natural guardian
Saroja).

Vs.

1.Ema Gounder
2.Patcha Gounder
3.Duraiswamy Gounder
4.Ramaswamy Gounder ... Respondents/Defendants

Second appeal filed against the Judgment and decree dated 10.04.1995 made in A.S.No.83 of 1994 on the file of Sub Judge, Tiruvannamalai, reversing the judgment and decree dated 29.10.1993 made in O.S.No.200 of 1986 on the file of Additional District Munsif, Tiruvannamalai.

For appellants : Mr.V.Ayyadurai

For respondents : Mr.M.N.Muthukumaran

J U D G M E N T

The plaintiffs in O.S.No.200 of 1986 on the file of the Additional District Munsif, Tiruvannamalai, are the appellants in the second appeal. The defendants in the said suit are the respondents herein. The parties are arrayed in the same position as they have been arrayed before the trial Court.

2. The case of the plaintiffs in nutshell is as follows:- Suit 'A' schedule property originally belonged to one Ramasamy Naidu, s/o.Govinda Naidu. Ramasamy Naidu sold the suit property by a registered sale deed dated 03.05.1943 to the first

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plaintiff's father viz. Ellappa Gounder. Suit 'B' schedule property absolutely belongs to the defendants. The said property has been purchased by the defendants' grand father viz. Pachayappa Gounder under a registered sale deed dated 06.04.1925. Thus, the 'A' schedule property was purchased by the first plaintiff's father Ellappa Gounder and 'B' schedule property was purchased by the defendants' grandfather Pachayappa Gounder. Even though suit 'A' schedule property was purchased by the first plaintiff's father, by mistake, he was enjoying suit 'B' schedule property. Likewise, even though the defendants' grandfather purchased suit 'B' schedule property, by mistake he was enjoying suit 'A' schedule property. The mistake continued thereafter also and the plaintiffs and the defendants are mistakenly enjoying their respective properties. Further, the first plaintiff executed a settlement deed in favour of the sons viz., the second and third plaintiffs on 20.12.1982 and the mother of the second and third plaintiffs has been appointed as guardian for the said property. Thus, the first plaintiff is the owners of 1.18 cents and plaintiffs 2 and 3 by virtue of the settlement deed became the owners of o.22 cents. When the mistake came to his knowledge, the first plaintiff caused notice to the defendants and since the defendants did not accede to his request, the suit referred to above has been filed.

3. The first defendant filed a written statement, which has been adopted by defendants 2 to 4, wherein the following facts have been set out:- The first defendant's father Pachayappa Gounder was the owner of suit 'A' schedule property and till his death, he was in possession and enjoyment of the same. Since the first defendant and previously his father were enjoying the property time immemorial in respect of suit 'A' schedule property, the first defendant along with his brothers have partitioned suit 'A' schedule property and other properties. In the said partition, the suit 'A' schedule property came to the share of the first defendant. Thus, the defendants sought for the dismissal of the suit.

4. Before the trial Court, the first plaintiff examined himself as P.W.1 and one Rama Gounder has been examined as P.W.2. Exs.A.1 to A.8 have been filed and marked on the side of the plaintiffs. The first defendant examined himself as D.W.1 and one Ramalingam has been examined as D.W.2. Exs.B.1 to B.16 have been filed and marked on the side of the defendants.

5. The learned Additional District Munsif, Tiruvannamalai, after considering the evidence adduced on the side of the plaintiffs and the defendants and also relying on the documents filed by both sides, decreed the suit by its judgment and decree dated 29.10.1993.

6. Aggrieved over the said judgment and decree, the defendants have preferred an appeal before the Subordinate Judge,

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Tiruvannamalai in A.S.No.83 of 1994. The learned appellate Judge reversing the said finding rendered by the learned Additional District Munsif, Tiruvannamalai, allowed the appeal filed by the defendants by judgment and decree dated 10.04.1995. Thus, the plaintiffs have come forward with the present second appeal.

7. The questions of law that were framed in the second appeal are as follows:-

(i) Whether the finding of the lower appellate Court that knowledge of real owner is immaterial for claiming adverse possession would constitute error of law which warrants interference in the second appeal ?

(ii) Whether the lower appellate Court is right in applying a dictum laid down in a case of easementary right to the facts of this case ?

(iii) Whether the lower appellate Court is right in affirming the claim for adverse possession without any documentary evidence to show the continuous possession ?

8. Mr.V.Ayyadurai, learned counsel appearing for the appellants / plaintiffs contended that though suit 'A' schedule property has been purchased by the first plaintiff's father one Ellappa Gounder by a registered sale deed dated 03.05.1943 from one Ramasamy and that the defendants' grandfather one Pachayappa Gounder has purchased the suit 'B' schedule property by a registered sale deed dated 06.04.1925, both of them by mistake, were enjoying different properties viz. the first plaintiff's father was enjoying suit 'B' schedule property and the defendants' grandfather was enjoying suit 'A' schedule property. When the mistake came to the knowledge of the plaintiffs, they caused legal notice to the defendants. In spite of the fact, the defendants did not accede to the request that has been made by the plaintiffs and hence the plaintiffs were constrained to file the suit for declaration and for possession. The learned trial Judge, considering all the aspects of the matter, decreed the suit filed by the plaintiffs. However, the learned appellate Judge, without considering the relevant materials, erroneously came to the conclusion that the defendants have perfected title by adverse possession. According to the learned counsel appearing for the appellants, unless and otherwise it is proved by the defendants that the defendants and before them their predecessors in title were enjoying suit 'A' schedule property with the knowledge of the plaintiffs or their predecessors knowingly well that the said property belongs to them, the defendants cannot plead that they have perfected title by adverse possession. Learned counsel appearing for the appellants further submitted that when the plaintiffs are not aware that they are the owners of suit 'A'

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schedule property and are enjoying the suit 'B' schedule property, likewise the defendants are not aware that they are the owners of suit 'B' schedule property and are enjoying suit 'A' schedule property, the claim of adverse possession does not arise at all.

9. Per contra, Mr.M.N.Muthukumaran, learned counsel appearing for the respondents / defendants contended that the defendants have perfected title by adverse possession because the defendants and their predecessors were enjoying suit 'A' schedule property from time immemorial with the knowledge of the plaintiffs and their predecessors and hence, even though the grandfather of the defendants purchased suit 'B' schedule property, he enjoyed 'A' schedule property and in view of the continuous possession, the defendants have perfected title by adverse possession.

10. I have heard Mr.V.Ayyadurai, learned counsel appearing for the appellants and Mr.N.M.Muthukumaran, learned counsel appearing for the respondents.

11. Survey No.60/6B measuring about 1.40 cents at Mekkalur village is the suit 'A' schedule property and Survey No.60/6A measuring about 1.50 cents in the same village is the suit 'B' schedule property. Suit 'A' schedule property admittedly originally belonged to one Subbu Gounder, who has sold the same to one Ramasamy Naidu under Ex.A.1. The first plaintiff's father one Ellappa Gounder has purchased suit 'A' schedule property from the said Ramasamy Gounder under Ex.A.2. The said purchase has been made on 03.05.1943. Likewise, suit 'B' schedule property was purchased by the defendants' grand father viz. Pachayappa Gounder under a registered sale deed dated 06.04.1925, which has been marked as Ex.A.6. Thus, suit 'A' schedule property was purchased by the first plaintiff's father Ellappa Gounder and suit 'B' schedule property was purchased by the defendants' grand father Pachayappa Gounder. This fact has been admitted by both sides. Further, even though the first plaintiff's father purchased suit 'A' schedule property, he was enjoying suit 'B' schedule property. Likewise, even though Pachayappa Gounder has purchased suit 'B' schedule property, he was in possession and enjoyment of suit 'A' schedule property. This fact is also admitted by both the plaintiffs and the defendants.

12. It is the case of the plaintiffs that as soon as the mistake came to their knowledge, Ex.A.7 notice has been caused by the plaintiffs to the defendants. Ex.A.8 is the reply given by the defendants. Even the first defendant, who has been examined as D.W.1 admitted in his evidence that the defendants are not in possession and enjoyment of the suit 'A' schedule property knowingly well that it belongs to the plaintiffs. It is the case of the first defendant that the defendants and their predecessors were in possession and enjoyment of suit 'A' schedule property and they perfected title by adverse possessions. The defendants can

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plead and establish adverse possession provided if their case is that they and their predecessors are enjoying the suit 'A' schedule property with the knowledge of the plaintiffs and their predecessors and that the plaintiffs and their predecessors are aware that the property belongs to them. If it is the case of the defendants that the plaintiffs are aware that suit 'A' schedule property belongs to them and in spite of the same, they allowed the defendants and their predecessors to enjoy the same, then it could be said that the defendants and their predecessors have perfected title by adverse possession. But, that is not the case of the defendants and it is not even the case of D.W.1, the first defendant in his evidence before the trial Court. The trial Court has considered the above said aspect and decreed the suit filed by the plaintiffs. However, on an erroneous view, the first appellate Court has held that the defendants have perfected title by adverse possession. As discussed above, the claim of adverse possession can be pleaded and established by the defendants provided if they plead that they are enjoying suit 'A' schedule property with the knowledge of the plaintiffs that it belongs to them. But, however, it is not the case of the defendants either in the written statement or in the evidence. Unfortunately, the first appellate Court has not considered this aspect.

13. The learned counsel appearing for the appellants though produced number of authorities, I am inclined to consider only two judgments that have been cited by him. In the decision reported in the case of P.T.Munichikkanna Reddy vs. Revamma - (2007) 4 M.L.J.912 (SC), while considering the case of adverse possession, Their Lordships of the Supreme Court have held in para 18 of the said judgment as follows:-

> " Thus, there must be intention to dispossess. And it needs to be open and hostile enough to bring the same to the knowledge and plaintiff has an opportunity to object. After all adverse possession right is not a substantive right but a result of the waiving (wilful) or omission (negligent or otherwise) of right to defend or care for the integrity of property on the part of the paper owner of the land. Adverse possession statutes, like other statutes of limitation, rest on a public policy that do not promote litigation and aims at the repose of conditions that the parties have suffered to remain unquestioned long enough to indicate their acquiescence."

14. Yet another decision that has been cited by the learned counsel appearing for the appellants is reported in (2007) 4 M.L.J. 1076 (SC) - Binapani Paul vs. Pratima Ghose. In the said decision, the Apex Court has relied on the judgment reported in (2006) 7 SCC 570 - T.Anjanappa and others vs. Somalingappa and

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another and paragraphs 12 and 21 of the said judgment are referred to here under:-

> " 12. The concept of adverse possession contemplates a hostile possession i.e., a possession which is expressly or impliedly in denial of the title of the true owner. Possession to be adverse must be possession by a person who does not acknowledge the other's rights but denies them. The principle of law is firmly established that a person who bases his title on adverse possession must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to denial of his title to the property claimed. For deciding whether the alleged acts of a person constituted adverse possession, the animus of the person doing those acts is the most crucial factor. Adverse possession is commenced in wrong and is aimed against right. A person is said to hold the property adversely to the real owner when that person in denial of the owner's right excluded him from the enjoyment of his property.
>
> 21. The High Court has erred in holding that even if the defendants claim adverse possession, they do not have to prove who is the true owner and even if they had believed that the Government was the true owner and not the plaintiffs, the same was inconsequential. Obviously, the requirements of proving adverse possession have not been established. If the defendants are not sure who is the true owner the question of their being in hostile possession and the question of denying title of the true owner do not arise ..."

15. In the decision (2007) 6 SCC page 59 cited above, Their Lordships of the Supreme Court have clearly held that the adverse possession in one sense is based on the theory of presumption that the owner has obtained the property to the adverse possessor on the acquiescence of the owner to the hostile acts and claims of the person in possession. In the present case on hand, as discussed earlier, it is not the case of the defendants that they are enjoying suit 'A' schedule property with the knowledge of the plaintiffs, who are aware that it belongs to them. Thus, considering the totality of the circumstances and also considering the evidence both oral and documentary, I am constrained to hold that the plaintiffs have established their case and the trial Court has rightly decreed the suit and the appellate Court failed to take note of the law settled on the issue of adverse possession. Thus, the questions of law framed in the second appeal are answered in favour of the appellants. Hence, I am constrained to set aside the judgment and decree of

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the first appellate Court made in A.S.No.83 of 1994 dated 10.04.1995.

16. In the result, the second appeal stands allowed. However, there is no order as to costs. Consequently, connected petition is closed.

Sd/
Asst.Registrar

/true copy/

Sub Asst.Registrar

sbi

To

1.The Subordinate Judge,
Tiruvannamalai.

2.The Additional District Munsif,
Tiruvannamalai (with records).

3.The Record Keeper,
V.R.Records, High Court, Madras.

one cc to Mr.V.Ayyadurai, advocate SR.No.68368

one cc to Mr.N.Muthukumaran, advocate SR.No.68848

S.A.NO.1383 OF 1995

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